

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF PUERTO RICO

3 INTERIOR DEVELOPERS, INC.,
4 et al.,

5 Plaintiffs,

6 CIVIL NO. 06-1368 (RLA)

7 v.

8 ELAINE L. CHAO, SECRETARY OF
9 THE U.S. DEPARTMENT OF LABOR,

10 Defendant.

11 **ORDER GRANTING DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT**

12 Plaintiffs seek judicial review of the denial of a petition for
13 an alien labor certification by the United States Department of
14 Labor. The certification was requested by INTERIOR DEVELOPERS, INC.
15 ("INTERIOR DEVELOPERS") on behalf of alien HUMBERTO GARCIA-RÖMER, a
16 prerequisite for the issuance of a permanent work immigrant visa.

17 Both parties have filed cross motions for summary judgment. The
18 Court having reviewed the administrative record finds that the DOL's
19 decision must be upheld.

20 **BACKGROUND**

21 On July 18, 2002, INTERIOR DEVELOPERS, a commercial construction
22 company established in 1993 and dedicated to the design and
23 construction of interior spaces, filed a petition for alien labor
24 certification on behalf of HUMBERTO GARCIA-RÖMER seeking to employ
25 him as a Construction Inspector. According to the application, the
26 requirements for the position were a Bachelor of Science in Civil
Engineering as well as the following "special requirements":

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4 (a) Demonstrated ability to use the Project Management Program
(produced by Microsoft).

5 (b) Demonstrated ability to use Word, Excel and Power Point.

6 (c) Demonstrated ability to use program for cost estimate.

7 (d) Demonstrated knowledge in concrete and steel structural
design.

8 On June 11, 2003, the DOL's Certifying Officer ("CO") issued a
9 Notice of Findings advising of its intent to deny the petition.
10 Specifically, the Certifying Officer found that the aforementioned
11 special requirements were unduly restrictive. Plaintiffs were advised
12 that they could rebut these preliminary findings by "[s]ubmitting
13 evidence that clearly shows that the alien, at the time of hire, had
14 the qualifications now required. Rebuttal evidence must include...
15 showing where and when the alien acquired each of the required
16 skills."¹

17 INTERIOR DEVELOPERS responded on July 15, 2003 submitting the
18 following documents:

19 1. A letter subscribed by ERIKA BETANCOURT, INTERIOR
20 DEVELOPER's Human Resources Director, dated June 30, 2003,
21 containing a detailed response to each of the Certifying
22 Officer's specific concerns and explaining why MR. GARCIA-
23 RÖMER was the only qualified candidate for the proffered
24 job.

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26 ¹ Admin. Record p. 72.

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3 2. MR. GARCIA-RÖMER's sworn statement dated July 15, 2003,
4 vouching for how, when and where he had acquired each of
5 the special skills required for the Construction Inspection
6 position. Specifically, the affiant noted that the required
7 skills were learned as part of his undergraduate studies.

8 3. Two letters from INTERIOR DEVELOPER's competitors, i.e.,
9 FLEX MANUFACTURING and CRUZ MOYA ELEVATOR CONSULTANTS,
10 corroborating the minimum standards proffered in the
11 certification application.

12 On July 25, 2003, the Certifying Officer issued her final
13 determination denying the application.

14 On August 27, 2003, INTERIOR DEVELOPERS requested review of the
15 denial by the Board of Alien Labor Certification Appeals ("BALCA"
16 "BOARD").

17 On January 23, 2006, the Board issued its Decision and Order
18 affirming the Certifying Officer's denial of the labor certification.
19 This decision constitutes the final ruling of the DOL on this matter.

20 **STANDARD OF REVIEW**

21 Review of a denial of an alien labor certification petition is
22 governed by the Administrative Procedure Act ("APA") which provides
23 that the agency's decision may be set aside if found to be
24 "arbitrary, capricious, an abuse of discretion, or otherwise not in
25 accordance with law". 5 U.S.C. § 706(2) (A).

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2 "In applying the arbitrary and capricious standard of review, we
3 are deferential to the agency's decision". Commonwealth of Puerto
4 Rico v. U.S., 490 F.3d 50, 61 (1st Cir. 2007). See, Harrington v.
5 Chao, 372 F.3d 52, 55 (1st Cir. 2004) (review standard is "highly
6 limited"); N.L.R.B. v. Beverly Enterprises-Mass., Inc., 174 F.3d 13,
7 24 (1st Cir. 1999) ("highly deferential standard). "The task of a
8 court reviewing agency action under the APA's 'arbitrary or
9 capricious' standard is to determine whether the agency has examined
10 the pertinent evidence, considered the relevant factors, and
11 articulated a satisfactory explanation for its action including a
12 rational connection between the facts found and the choice made."
13 N.L.R.B. v. Beverly Enterprises-Mass., Inc., 174 F.3d 13, 23 (1st Cir.
14 1999) (citations, internal quotation marks, brackets and footnotes
15 omitted).

16 **ALIEN LABOR CERTIFICATION**

17 The DOL administers the permanent labor certification program
18 whereby aliens seeking permanent employment in the United States may
19 obtain work visas. Pursuant to § 212(a)(5)(A) (2001) of the
20 Immigration and Nationalization Act ("INA") certification is limited
21 to instances where "there are not sufficient workers [in the United
22 States] who are able, willing, qualified... and available [to perform
23 the particular labor at issue and] the employment of such alien will
24 not adversely affect the wages and working conditions of workers in
25 the United States similarly employed." 8 U.S.C. § 1182(a)(5)(A)(I)
26 and (II).

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2 As part of the permit process, the employer must advertise the
3 job position and take active steps to recruit United States workers.
4 20 C.F.R. 656.21(g).² A written report of its unfruitful recruitment
5 efforts must be submitted to the DOL. See, §§ 656.21(b) and
6 656.21(j)(1).

7 A petition may be rejected if the job offer contains restrictive
8 job requirements which are not justified by a business necessity. The
9 rationale behind this rule is to avoid tailor-made requirements
10 designed to accommodate the particular qualifications of an alien to
11 the detriment of qualified U.S. workers. Accordingly, the regulations
12 governing the certification process provide that "unless adequately
13 documented as arising from business necessity" the job requirements
14 "[s]hall be those normally required for the job in the United States
15 [and] those defined in the Dictionary of Occupational Titles".
16 ("DOT") § 656.21(b)(2)(i).

17 Inasmuch as the special requirements set forth by INTERIOR
18 DEVELOPERS in its petition, i.e., "demonstrated ability" to use
19 certain software applications as well as "[d]emonstrated knowledge in
20 concrete and steel structural design" do not appear in the DOT
21 definition applicable to the position of Construction Inspector, DOT
22 Code No. 182.267-010, it must establish business necessity for the
23 same.

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25 ² Citations in this Opinion refer to regulations in effect
26 through March 27, 2005. Amendments thereto, which became effective
March 28, 2005, apply to labor certification applications filed on or
after that date.

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3 The standard set forth in Information Indus., Inc., 88-INA-82,
4 1989 WL 250355 (BALCA Feb. 9, 1989) (en banc), is used for evaluating
5 whether the job requirements under challenge meet the business
necessity exception. This standard provides that:

6 [T]o establish business necessity under § 656.21(b)(2)(i),
7 an employer must demonstrate that the job requirements bear
8 a reasonable relationship to the occupation in the context
9 of the employer's business and are essential to perform, in
10 a reasonable manner, the job duties as described by the
11 employer... An employer cannot obtain alien labor
12 certification by showing that the job requirements merely
13 "tend to contribute to or enhance the efficiency and
14 quality of the business"... On the other hand, this
15 standard is not impossible to meet. An employer has the
16 discretion, within reason, to obtain certification for any
17 job whose requirements are directly related to its
18 business, and does not have to establish dire financial
19 consequences if the job is not filled or is filled by a
20 U.S. worker who is not fully qualified.

21 1989 WL 250355 at *6 (internal citation and footnote omitted).

22 The Board agreed with the reasoning of the Certifying Officer to
23 the effect that inasmuch as applicants need only possess a Bachelor
24 of Science Degree in Civil Engineering and no prior experience was
25 required for the position, the aforementioned special requirements
26 must have, perforce, been part of the applicants' undergraduate

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2 curriculum. Because there was no adequate evidence in the record to
3 substantiate these particular requirements were part of the studies
4 leading to the mandatory university degree, it ruled that the
5 Employer had not adequately proven business necessity for the
6 additional requisites.

7 It further stated that, even "assuming arguendo that the
8 Employer's rebuttal established that the job requirements bear a
9 reasonable relationship to the occupation in the context of the
10 employer's business and are essential to perform, in a reasonable
11 manner, the job duties as described by the employer, the rebuttal
12 fails to establish how such requirements mesh with its lack of a
13 requirement for advanced education or work experience. We are not
14 sure why the Employer structured its job requirements in the way it
15 did, but since it did not require work experience or an advanced
16 degree, we concur with the CO that the special requirements were
17 unduly restrictive and not justified by business necessity."³

18 Plaintiffs contend that they adequately demonstrated that the
19 additional requirements met the business necessity standard under
20 *Information Indus.*; the documentation submitted by INTERIOR
21 DEVELOPERS evidencing that the demanded skills were part of the B.S.
22 degree in Civil Engineering was sufficient and that requiring
23 additional evidence was "burdensome and unreasonable".

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³ Admin. Record p. 7.

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2 Given the limited scope of our review we are bound to conclude
3 that the DOL's determination was neither arbitrary nor capricious.

4 The Employer's attempt to prove that the use of the cost
5 estimate program was part of the undergraduate degree studies failed.
6 The Board's ruling that the Alien's dominion over the "costs estimate
7 software" did not derive from his work experience with INTERIOR
8 DEVELOPERS is proper based on the evidence available in the record.
9 Hence, demanding this skill from U.S. employees was not reasonable.
10 INTERIOR DEVELOPERS having failed to establish the business necessity
11 element, rejection of an otherwise qualified U.S. applicant for lack
12 of knowledge of the costs estimates program was improper.

13 The fact that there may be evidence in the record that the
14 requirements bore a reasonable relationship to the occupation in the
15 context of the employer's business, does not detract from the fact
16 that INTERIOR DEVELOPERS failed at the second stage, i.e., that these
17 requirements were essential to the performance of the duties as
18 described in the application.

19 Further, the Board's rejection of the two letters from other
20 employers regarding the requirements was not unreasonable since there
21 is no reference to any underlying factors supporting the
22 corroborations.

23 In making this ruling we are mindful of the important public
24 interest underlying the applicable statute and regulations. "The
25 certification process is designed to preserve jobs for qualified U.S.
26 workers, if there are any available... The issue is whether the U.S.

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3 applicants are *qualified for the job*, not whether they are less
 4 qualified than the alien. Were the latter the case, the whole process
 5 would be meaningless." Posadas de P.R. Assoc. v. Secretary of Labor,
 6 698 F.Supp. 396, 400 (D.P.R. 1988). As explicitly indicated in
 7 *Information Indus.*, it is important to note that the standard imposed
 8 therein "gives appropriate emphasis to the Act's presumption that
 9 qualified U.S. workers are available." 1989 WL 250355 at *6.

CONCLUSION

10 Based on the foregoing, Plaintiffs' Motion for Summary Judgment
 11 (docket No. 22)⁴ is **DENIED** and Defendant's Cross-Motion for Summary
 12 Judgment (docket No. 25)⁵ is **GRANTED**.

13 Accordingly, the DOL's decision to deny the application for an
 14 alien labor certification submitted by INTERIOR DEVELOPER on behalf
 15 of HUMBERTO GARCIA-RÖMER is hereby **AFFIRMED**.

16 Judgment shall be entered accordingly.

17 IT IS SO ORDERED.

18 San Juan, Puerto Rico, this 9th day of November, 2007.

19
 20 _____
 21 S/Raymond L. Acosta
 RAYMOND L. ACOSTA
 22 United States District Judge
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25 ⁴ See, Defendant's Response (docket No. 25) and Defendant's
 Surreply (docket No. 31).

26 ⁵ See, Plaintiffs' Opposition (docket No. 30).